Laws on Political Committees

What are state laws on political committees, and why are they evaluated in the Free Speech Index? Political committee laws are intended to cover organizations formed to advocate the election or defeat of candidates. If an organization becomes a political committee, known commonly as a PAC,[7] it must register with the state and file detailed reports of its activities.

Some groups engage in just such behavior; they wish to speak to voters and urge them to cast ballots for or against particular candidates. If these groups spend a certain amount of money on candidate advocacy, in nearly all states they will have to become a PAC and comply with detailed rules for engaging in such speech.

Other groups advocate for particular causes, not candidates, while still others engage in a mixture of the two. In some states, both types of groups are regulated as PACs. Such regulation makes it much more difficult to speak, publish, or associate with like-minded people to promote a cause.

This portion of the Index examines the clarity and burdens of state PAC laws on speech. If groups don't know where the lines for determining PAC status are drawn, it is more difficult to speak about the causes they seek to promote. To maximize speech and association rights for these groups, political committee laws must capture only groups whose purpose is, in fact, electoral politics. The Index evaluates how well states achieve that goal. But the burdens on PACs should also be minimal to allow groups to campaign for their favored candidates and not spend their time and resources mired in campaign finance bureaucracy. This section evaluates those burdens as well.

The Index evaluates laws governing political committees in four key areas:

- How much campaign spending triggers an evaluation of whether a group might become a political committee?
- How much of a group's activity must be campaign activity to trigger registration as a PAC? Is a group highly regulated if it only speaks infrequently to support the election or defeat of a candidate? Or does a group fall under these burdensome regulations only if that is its *major or primary* purpose?
- What kind of speech counts toward triggering PAC status? Are the definitions tied to speech clearly supporting or opposing the election of a candidate? Or are the definitions broader and/or vaguer than that standard?
- What are the reporting requirements for PACs? How extensively do they burden free speech and free association for regulated groups?

Measuring Campaign Spending: How Much Spending Triggers an Evaluation of Political Committee Status?

No citizen or group should have to register or report to the government before they decide to spend a few hundred dollars on some flyers, a billboard, or Facebook ads urging their fellow citizens to vote for or against a candidate. But in

some states, as soon as a few friends spend or collect any money, they must begin filing tedious reports as a PAC. At times, the burdens of filing these complex forms will exceed the amount the group spends.

PAC status obliges organizations to designate certain officers, namely, a treasurer, and establish accounting processes. In the Supreme Court case, *Federal Election Commission v. Massachusetts Citizens for Life, Inc.* ("*MCFL*"),[8] many justices were troubled by the burdens placed upon nonprofit organizations by the reporting requirements of political committee status. Some were concerned with the detailed record-keeping, reporting schedules, and limitations on fundraising required by federal laws regulating PACs.[9] Likewise, Justice Sandra Day O'Connor was concerned with the law's "organizational restraints," including "a more formalized organizational form" and a significant loss of funding availability.[10]

Other courts have followed suit in requiring a balance between the amount of activity and when groups can be forced to register and report as PACs. For example, in *Canyon Ferry Road Baptist Church of East Helena, Inc. v. Unsworth*, the Ninth Circuit held that the trivial value of a Montana church copier and volunteer time was not sufficient to require disclosure of every member of the church who gave money to the congregation, following an effort by some parishioners to speak about a pending ballot measure through the church.[11] As the Ninth Circuit explained, "[a]s the monetary value of an expenditure in support of a ballot issue approaches zero, financial sponsorship fades into support and then into mere sympathy."[12] The court emphasized that voters gain little information about "the *financial* backing" of a campaign when a group's "activities [are] of minimal economic effect."[13]

The Ninth Circuit is in line with her sister circuit to the east. In *Coalition for Secular Government v. Williams*, the Tenth Circuit held that an organization's planned activity of $3,500 was impermissibly low for triggering Colorado's regulation of an organization as an "issue committee," given the associated reporting requirements.[14]

Despite these constitutional problems, many states still force small groups to register and report. In Alaska, for example, a group must register prior to making *any* expenditure in support of or in opposition to a candidate.[15] Even spending one dollar qualifies, and every group must register with the state.[16] Donors' names, addresses, occupations, and employers are disclosed for all those giving over $100 during the calendar year.[17] Thus, even donating $10 a month will lay bare an individual's personal information on an Alaskan campaign finance report. Far from capturing big-time political players, this requirement unnecessarily violates the privacy of everyday Alaskans.

Other states have designed better options. Nebraska, for example, does not require PAC registration and reporting until a group receives more than $5,000 in contributions or makes over $5,000 in expenditures (or any combination thereof) in a calendar year.[18] Even better, Georgia's threshold for PAC registration and reporting kicks in once a group receives or spends more than $25,000, the highest in the country.[19] Higher thresholds in states like Georgia and Nebraska save groups from inappropriately bearing PAC status – and its attendant reports and other obligations – for relatively minimal amounts of political activity. In other words, states like Georgia and Nebraska avoid the problems the courts identified in *Canyon Ferry* and *Coalition for Secular Government*.

While the figure is too low, Arizona's $1,000 PAC registration threshold is indexed to inflation.[20] States that tie registration thresholds to inflation prevent speakers from complying with complex PAC rules for increasingly minimal amounts of activity over time.

The best way to avoid forcing groups engaged in minimal advocacy for or against candidates or causes from having to register and report as PACs is to set a reasonable dollar threshold and index that threshold to inflation. If a group doesn't spend significantly on campaign advocacy, it shouldn't qualify as a PAC.

Measuring Campaign Activity: "The Major Purpose" Test

While a high threshold for election campaign activity is the simplest way to avoid chilling the speech and association rights of small groups, there are other fundamental issues to address in laws regulating PACs. First, what is campaign activity? The default guidance of the First Amendment is that groups should be able to speak publicly and associate privately, regardless of how much they spend. Only a legitimate and substantial governmental purpose (like the avoidance of corruption or its appearance) can overcome this burden.

As far back as 1960, the Supreme Court has held that, even when a governmental purpose is legitimate, "that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved."[21] When the First Amendment is implicated, courts do not perform "a loose form of judicial review,"[22] but instead apply a "strict test."[23] It is important that courts perform a careful review of both the asserted governmental interest *and* whether the law is tailored to that interest because, "[i]n the First Amendment context, fit matters."[24]

In the ensuing decades, the Supreme Court has consistently shielded organizational donors and supporters of nonprofit advocacy groups from public disclosure. This vital right to private association allows Americans to join together to speak collectively. These protections are especially important when speaking on unpopular topics or criticizing actions by government officials, as such speech can trigger harassment of or reprisals against an organization and its donors and members. The right to privacy in association was a key victory earned during the civil rights era, and the narrow exception for giving to political campaigns does not permit a state to trample upon this First Amendment right.

When a group becomes a political action committee, it faces heavy burdens that make it more costly to speak. PACs must file numerous, detailed reports on who runs the organization, who gives money to it, and what it spends its money on. In at least one state, a political committee must even list the specific post office where it bought its stamps.[25] Reporting on such extraordinary minutiae chills group activity; these laws, therefore, should apply only to groups whose activity is clearly and expressly campaign-focused. That is, only groups that primarily urge voters to cast their ballots in a certain way should be required to report their activities and supporters to the government.

The problem is that not all talk about a candidate supports or opposes their campaign for office. Candidates are often *already* officeholders, either seeking reelection or higher office. As a result, discussion about candidates is often also discussion about government policy. For exam-

ple, a group may urge a candidate for district attorney to support criminal justice reform. That doesn't mean the group favors or opposes the candidate, and they shouldn't be forced into a system designed to regulate candidate advocacy. To avoid such a scenario, PAC status must be tied to groups that primarily work for particular electoral outcomes. In campaign finance law, this is known as "the major purpose" test.[26] In simpler terms, the major purpose test requires that a group's electoral activity comprise more than half of its overall activities or spending.

The Index views laws limiting PAC regulations to only those groups that have their major purpose as electing candidates as most beneficial to free speech. States are rated highly in this portion of the Index when they follow the Supreme Court's major purpose test to determine PAC status. The major purpose test is the clearest and most speech-friendly option for determining PAC status.

Candidate committees, for example, obviously support or oppose electoral outcomes and are campaign-related.[27] Organizations with "the major purpose" of supporting or opposing candidates can, therefore, be subject to campaign finance disclosure.[28]

Laws that go beyond the major purpose test to force groups into PAC status are on shakier legal ground. The Supreme Court has limited campaign finance disclosure only to donors who would know that a group would be speaking "unambiguously" through campaign-related messages. The Court acted explicitly to prevent the chilling of issue speech that merely mentioned a candidate.[29]

If an organization is neither controlled by a candidate nor has as its major purpose accomplishing particular electoral outcomes, then disclosure is appropriate only for activity that is "unambiguously campaign related."[30] Under the First Amendment, the more disclosure is divorced from actual advocacy for or against candidates, the greater the threat to protected speech about issues. The state bears the burden of proving its asserted interest in tracking what citizens say.[31]

Thus, the best way of protecting the First Amendment is regulating only those organizations with the major purpose of electoral politics. Some states do this well, like Wisconsin, where a "political action committee" is defined as:

> any person, other than an individual, or any permanent or temporary combination of 2 or more persons unrelated by marriage that satisfies any of the following:
> 1. It has the *major purpose* of express advocacy, as specified in the person's organizational or governing documents, the person's bylaws, resolutions of the person's governing body, or registration statements filed by the person under this chapter.
> 2. It uses *more than 50 percent of its total spending* in a 12-month period on expenditures for express advocacy, expenditures made to support or defeat a referendum, and contributions made to a candidate committee, legislative campaign committee, or political party. In this subdivision, total spending does not include a committee's fundraising or administrative expenses.[32]

Wisconsin's law is clear. To be regulated as a PAC, the sole major purpose of the organization must be advocating for or against candidates. Speakers in Wisconsin know that once they spend the majority of their program expenses on express advocacy – speech that supports or opposes a candidate or ballot issue – or on contributions

to candidates or other political committees, they qualify as a PAC. Wisconsin's PAC definition serves as a model for other states.

Some states take a vaguer and more expansive approach to determining PAC status by using the term "a primary purpose" or by considering multiple major purposes.[33] These states force a group to be regulated as a PAC if nominating or electing candidates is only "*a* major purpose" of an organization. This means that electoral activity does not need to be more than half of a group's activities or spending, but merely some significant yet unspecified part of its overall activity. In Kentucky, for example, a "permanent committee" must merely have "a primary purpose" of engaging in express advocacy to trigger PAC status.[34] This type of vague test makes it difficult or impossible to discern whether an organization is subject to onerous campaign finance regulations. After all, some organizations care deeply about an issue or multiple issues – the environment, health care, or taxes, for example – and only sometimes wade into political advocacy. The lack of clarity chills speech and association. In one notable example from Hawaii, similarly broad language caused a plumbing company to become a PAC.[35]

A final category of states have no purpose test at all. In these states, PAC status is triggered by a group spending some small amount on electoral activity. These states leave citizens in the dark about how much speech might trigger the state's PAC registration and reporting requirements. Arkansas[36] and California,[37] for example, have no such test. These states should provide better clarity for their residents, and the major purpose test is one key part of doing just that.

When states fail to use the major purpose test, they capture a larger group of speakers and make their residents wary of speaking about candidates and issues. When more speakers are regulated, the burdens of civic engagement become higher, and groups are less likely to exercise their political speech rights. A First Amendment-friendly approach uses the major purpose test to help determine if a group is a political committee. The Index rates states in this area accordingly.

Determining PAC Status: What Speech Counts?

The major purpose test is vital. But what speech counts in assessing a group's purpose is equally important. If a state follows the major purpose test, but then counts toward that purpose nearly any funds spent on speech about issues, the state has effectively limited association and chilled speech just as much or more than a state that disregards the major purpose doctrine.

Every state has a slightly different manner of defining what activity counts toward PAC status. To rate a state's law, this Index approaches the reading of a statute as a lay reader attempting to follow the law would. After all, "[t]he First Amendment does not permit laws that force speakers to retain a campaign finance attorney," just to speak.[38]

As the Supreme Court has explained, a poorly worded law leaves people "of common intelligence" to "necessarily guess" at what a statute means.[39] Worried about hefty fines – or even jail time – for violating complex campaign finance laws, speakers will "hedge and trim" their message.[40] To avoid chilling speech, state statutes should clearly and simply define what speech counts for determining PAC status.

Definitions fall into three broad categories. First, states that best protect First Amendment activ-

ity use clear definitions that are tailored to cover only campaign advocacy. These definitions are tied solely to contributions or expenditures. California, for example, defines speech that counts for PAC status based solely on the receiving or making of "contributions" or the making of "independent expenditures."[41] These terms are clear and tied to the outlay of money. No other activity affects PAC status, and groups can act with an understanding of what will and will not trigger registration and reporting obligations.

Second, some states provide clear, but broad definitions that extend beyond contributions and expenditures. Montana, for example, defines a "political committee," in part, as when a group "prepare[s] or disseminate[s] an election communication, an electioneering communication, or an independent expenditure."[42] Under these broad categories, sharing others' work, even a meme online, could qualify. Ohio's law is triggered when a group of two or more persons "support or oppose" a candidate, party, or ballot measure.[43] Definitions that move away from financing campaign speech to other types of activity sweep too broadly, but the Index gives partial credit for such definitions because the statutes at least clarify what activity qualifies towards PAC status.

Third, some states use vague, expansive language to define speech counting toward PAC status. Vague terms make it impossible to know when mere discussion becomes regulable campaign activity. One of the best, or more appropriately worst, examples of an unclear definition is found in New York's law. The Empire State defines a "political committee," in relevant part, as the following:

> any corporation aiding or promoting and any committee, political club or combination of one or more persons operating or co-operating to aid or to promote the success or defeat of a political party or principle, or of any ballot proposal; or to aid or take part in the election or defeat of a candidate for public office or to aid or take part in the election or defeat of a candidate for nomination at a primary election or convention, including all proceedings prior to such primary election, or of a candidate for any party position voted for at a primary election, or to aid or defeat the nomination by petition of an independent candidate for public office. . . .[44]

Terms like "aid," "co-operating to aid," "promote," and "take part in" are hopelessly vague. Reading this passage – a mere portion of the state's PAC definition – provides would-be speakers in New York with nothing but confusion. Groups cannot possibly know where the line between public policy and candidate advocacy is drawn. The definition is so vague that any group seeking to speak about public policy would be well-advised to obtain expert and costly legal counsel to guide their speech. And even then, disagreement among expert attorneys is likely.

Burdens of Political Committee Registration and Reporting Requirements: What Must Be Reported?

Finally, this section of the Index examines the registration and reporting burdens on PACs. The less onerous the requirements for PACs, the more likely that citizens will want to participate in the political process. Groups should be able to express their views without unnecessary red tape or exposing small donors to public exposure.

Measuring the complexity of all details of PAC registration and reporting requirements would itself be difficult. State reporting requirements

differ in the details of what information should be reported and when. Instead, the Index focuses on the reporting of donors, one of the most burdensome and chilling aspects of PAC reporting. If a state understands and limits the burdens of public donor reporting, it likely limits other PAC reporting burdens as well.

Most citizens recognize that having their private information and political allegiances publicly disclosed could lead to negative consequences. Research has shown that citizens are less likely to contribute to issue campaigns if their address and employer are publicly disclosed.[45] Worse still, little can be done once individual contributor information – typically a donor's full name, street address, occupation, and employer – is made public. In today's internet age, these sensitive details can immediately be used to harass, threaten, or financially harm a speaker or contributor to any cause by those who disagree.

In one experiment, access to disclosure information about the sources of support for a ballot initiative had "virtually no marginal benefit" on voter knowledge, and voters showed less interest in disclosure information than in other forms of information, such as news reports, editorials, and campaign ads.[46] Voters rarely seek disclosure information when deciding how to vote.[47]

While the benefits of disclosure are speculative, the costs are concrete. Compliance with disclosure laws often requires expensive legal counsel, an accountant, and other recordkeeping staff. It may be reasonable to impose these costs on large organizations and professionalized campaigns, but smaller groups can be deterred from political participation altogether by complex, overbroad regulations. The costs of mandated disclosure disproportionately harm grassroots organizations and campaigns run by volunteers.[48] Reporting requirements are often too complex for ordinary citizens to understand without the help of a lawyer.

Many of the privacy problems inherent in disclosure requirements can be drastically reduced simply by ensuring that requirements are only applied to major donors. While there may be good reasons for disclosure of large donors to candidates, parties, and PACs, nothing is gained from disclosure that publicly reports contributions of only a few dollars.

Raising donor disclosure thresholds also greatly simplifies reporting requirements for PACs. Requiring campaigns to report each $5, $10, or $25 donation is very burdensome, especially for small groups without professional help or software.

In New Jersey, individual donors to PACs are not disclosed until they make contributions totaling more than $300 "during the period covered by the report."[49] Nevada leads the nation in a privacy and speech friendly approach by requiring only contributions over $1,000 to be disclosed.[50] Nevada reasonably balances the harms of reporting a group's supporters against the perceived benefits.

Finally, the information required to be collected and disclosed about each donor varies greatly by state too. For instance, some states, like Michigan,[51] require PACs to collect detailed information on each contributor's occupation and employer when receiving donations, and this information, in turn, must be reported to the government. This additional information is often difficult to obtain. If a donor doesn't provide it, some states make the contribution illegal. Others mandate

duplicative efforts by committees to obtain the information. Maryland, for example, requires PACs to ask for this information, but donors can decline to identify their employer and occupation.[52] The best states – Nevada is one[53] – recognize that the reporting of employment information is invasive and of little use to the public and, accordingly, have no requirement for PACs to collect such minutiae.

Such mandates for additional information impose a heavy burden on small organizations with limited resources. Simultaneously, the informational interest of employer information is even more tenuous than donor disclosure itself. Employer information can unfairly tag employers with the opinions of their employees and is often misused to misinform voters.[54] Such abuse of disclosure discourages citizens from giving to PACs for fear of having their employer dragged into a political fight.